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The International Criminal Tribunal for the former Yugoslavia and the Transformation of International Humanitarian Law

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On 3 April 2000, French peacekeepers in Bosnia detained Momcilo Krajisnik, the top aide of former Bosnian Serb leader Radovan Karadzic and one of the leading Bosnian Serb political leaders during the conflict in the former Yugoslavia. Krajisnik was arrested as a result of a sealed (secret) indictment issued by the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. He is accused of grave breaches of the Geneva Conventions of 1949, genocide, violations of the laws or customs of war, and crimes against humanity – all four of the crimes listed in the ICTY's statute.

Krajisnik's high-profile detention is significant for a number of reasons. He is the highest-ranking suspect in the Tribunal's custody thus far, countering persistent complaints that only relatively minor players in the conflict are being brought to justice, leaving the worst purveyors of atrocities at large. The arrest is also indicative of the international community's – particularly NATO's – increased willingness to live up to its legal obligations to arrest indicted war criminals. These are all welcome developments given the importance of the Tribunal's work both for the former Yugoslavia and for international humanitarian law (IHL) in general.

International humanitarian law – also known as the law of armed conflict or *jus in bello* (the law in war) – is principally based on the Hague Conventions of 1899 and 1907, the four Geneva Conventions of 1949, and the two 1977 Additional Protocols to the Geneva Conventions.[1] Aside from Additional Protocol II and Common Article 3 of the Geneva Conventions, which specifically deal with internal conflicts, IHL is premised upon the existence of *inter-state* conflict. This, coupled with a lack of any clear enforcement mechanism or criminal law procedure, has made it an extremely unwieldy judicial instrument. The ICTY (along with its sister-tribunal, the International Criminal Tribunal for Rwanda (ICTR))[2] could change all that. This paper will argue that, despite its *ad hoc* and limited nature (geographically and temporally), the ICTY is currently the international community's best mechanism for making international humanitarian law relevant to the complex dynamics that characterize contemporary armed conflict.[3]

Making IHL relevant

The task of ensuring that international humanitarian law remains a useful tool for protecting victims of armed conflict is essential, yet extremely complex. The Tribunal must be careful not to overstep its jurisdiction by making judgments based on laws not in existence at the time of the crime. "Respect for the principles *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no penalty without law) requires that the Tribunal convict individuals only for violations of international humanitarian law that entail individual criminal responsibility under customary or conventional law applicable to the parties."[4] In addition, the court must be wary of interpreting laws in such a way as to essentially create new ones. This would undermine the court's legitimacy as "[s]tates will not have faith in the integrity of the Tribunal as a precedent for other *ad hoc* tribunals and for a permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of its jurisdiction."[5] If states begin to feel that the Tribunal is encroaching on their sovereignty or overstepping its mandate, there could be significant repercussions for the ICTY's own work, as well as for the development of the International Criminal Court (ICC).

At the same time, however, the Tribunal cannot adhere too stringently to rigid conceptions of IHL. Adhering too closely to the letter of the law, without regard for the complexities inherent in contemporary conflict, can result in decisions that do little to advance the cause of justice or human rights. Some have even argued that if the Tribunal does not push its mandate far enough, it could end up being counterproductive to the pursuit of a relevant international human rights regime. "As human rights tribunals, the *ad hoc* tribunals should be aware that they are mandated to provide a model of enlightened justice. Judges around the world, sitting in the most mundane criminal cases, will be influenced by their approaches to criminal law. Wrong or even confusing signals from The Hague and Arusha [Tanzania, the seat of the ICTR] may set human rights back decades, within the context of criminal justice."[6]

The Tribunal has spent the last seven years walking a tightrope between these two extremes – attempting to make IHL relevant, without simply making it up – as it works to translate Geneva Conven-

tion precepts into the concrete language of criminal law. This paper will not enter into the ongoing (and largely subjective) debate over how successful the ICTY has been. Instead, after providing a brief overview of the Tribunal's work, it will examine some of the most contentious issues the ICTY has faced to date – namely the questions of internationality and 'protected persons' as they apply to the prosecution of grave breaches of the Geneva Conventions. By focusing on these two problems, it will be possible to see the impact – positive or negative – that the Tribunal is having on the future of international humanitarian law and, by extension, on the manner in which future wars will be waged.

The ICTY

Acting under Chapter VII of the United Nations Charter, the Security Council created the ICTY on 25 May 1993, two years before the Dayton Peace Accords brought the Bosnian conflict to a close. The Tribunal was established with three principal objectives in mind: "to do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace."[7]

Unfortunately, there is little doubt that the Tribunal was unable to deter some of the gravest crimes of the conflict, many of which occurred *after* the establishment of the ICTY.[8] Until recently, it seemed that the international community has had little faith in the ability of the Tribunal to "contribute to the maintenance of peace" either. One of the greatest hurdles that the ICTY has had to overcome has been physically bringing indicted war criminals to trial. Having ruled out trials *in absentia* in its Statute, and without a police force of its own, the Tribunal is reliant upon NATO peacekeepers in the Balkans to make arrests. However, despite a legal obligation to carry out these arrests, they were initially very slow in coming.

> NATO policy states that IFOR [NATO Implementation Force] "will arrest such men only if they are noticed by their soldiers in the course of their normal duties and if the soldiers feel that circumstances permit."... In describing the reality of this policy, a high-ranking NATO officer jokingly explained that, "[o]f course, we'll arrest Karadzic . . . [b]ut he may have some trouble getting past the guards at our front gate if he arrives without an appointment."[9]

This attitude stems from a number of factors, including fears for the safety of the peacekeepers. Memories of the Bosnian Serb forces' use of UN personnel as human shields during the war, as well as of the casualties incurred by the Americans during the hunt for Somali warlord Mohamed Farah Aideed, were still fresh in the minds of NATO nations.[10] In addition, concerns that any arrests of high-ranking officials could destabilize the precarious peace in the region kept NATO from taking any action for many years.[11]

The first arrest by NATO's Stabilization Force (SFOR) finally took place in July 1997. "Other arrests followed, one upon another, by British, Dutch, and American forces, and 'World War Three didn't happen,' as [former Chief Prosecutor of the ICTY Louise] Arbour put it later."[12] This served to rebut many of the more exaggerated fears of destabilization, demonstrating that the admittedly still-fragile peace was robust enough to withstand the pursuit of justice. Most recently, the relatively muted negative response to Krajisnik's arrest has served to further encourage NATO action in this area. With an increasing number of defendants in custody – both due to arrests and surrenders – the Tribunal has been better able to fulfill the third component of its mandate, "to do justice."

To Do Justice

The ICTY is charged with bringing to trial individuals charged with "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[13] As mentioned earlier, the Statute of the ICTY lists four categories of crimes over which the Tribunal has authority: grave breaches of the Geneva Conventions of 1949 (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5). Of interest for the purposes of this paper is Article 2, which states that:

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed *grave breaches* of the *Geneva Conventions* of 12 August 1949, namely the following acts against *persons and property protected under the provisions of the relevant Geneva Convention*: (a) willful killing; (b) torture...; (c) willfully causing great suffering...[14]

With its reference to the Geneva Conventions, this Article has been particularly contentious for the Tribunal, raising questions as to the nature of the Bosnian conflict (internal *vs.* international) and the definition of 'protected persons'.

Internationality

It was during the case of *Prosecutor v. Tadic* that the question of the internationality of the conflict became a serious issue for the Tribunal. Dusan Tadic is a Bosnian Serb who was accused of "[t]hirty-one individual counts of persecution, murder, cruel treatment, and inhuman acts...in relation to events alleged to have occurred in the Prijedor region in northwest Bosnia, more specifically at the Omarska, Keraterm and Trnopolje camps..."[15] In the Tadic interlocutory appeal (pre-trial hearing), the defence argued that it was unlawful to charge Tadic for grave breaches because there was no international armed conflict at the time and place of the accused crime, as is required by the Geneva Conventions. The Trial Chamber disagreed with this argument, ruling that the Tribunal was applying *customary* international law rather than *conventional* international law. In other words, despite the fact that the Geneva Conventions themselves require the existence of international conflict, this requirement should not be imported into Article 2 of the ICTY Statute.[16] This decision was, however, immediately reversed by the Appeals Chamber who judged that the provisions of the Geneva Conventions alluded to in Article 2 "apply to persons or objects protected only to the extent that they are caught up in an international armed conflict."[17] Thus, any attempt to prosecute for grave breaches of human rights had to first establish that the conflict was international in nature at the time of the crime.

Many analysts have voiced concerns about the Appeals Chambers' decision, arguing that it has unnecessarily hamstrung the Tribunal by forcing it to return to the question of internationality on a case-by-case basis. This judgment could have a similarly unwelcome effect on prosecutions in future cases of state

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disintegration where, as in Bosnia, the line between international and internal becomes blurred. In contrast, had the Trial Chamber's decision stood, the Tribunal would have been able to avoid this aspect of the grave breaches debate. However, it would have done so by circumventing certain elements of the Geneva Conventions (i.e. internationality) that were inapplicable to the case. In the wider context of the transformation of IHL, therefore, perhaps the Appeals Chamber's decision can be seen as a positive one. Rather than simply ignoring the parts of the Geneva Conventions that are not readily applicable to the Balkan context, it is possible that the judgment has encouraged the ICTY to expend more effort on making the Geneva Conventions relevant to contemporary armed conflict as a whole.

Of note is the fact that, while the Appeals Chamber insisted that grave breaches of the Geneva Conventions could only occur within the context of an international conflict, it accepted that violations of the law or customs of war (Article 3 of the ICTY Statute) could be committed in internal *or* international armed conflict. The Appeals Chamber argued that Article 3 is of a residual nature and "thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4, or 5."[18] Notably, it was asserted that these offences include violations of Common Article 3 of the Geneva Conventions – the only Article referring specifically to internal conflict – and other customary laws that have evolved regarding internal conflicts. This is clearly a positive interpretation of the laws or customs of war – strengthening the power of the courts in an area (prosecutions in internal conflicts) that has historically been nebulous. While some commentators have charged that the court overstepped its authority in this ruling,[19] it can be argued that the Tribunal was simply recognizing the development of customary international law, which has seen notions of inalienable state sovereignty weaken in the face of the increasing preeminence of individual human rights.

Protected Persons

The Tadic case raised additional problems for the Tribunal. Not only was it necessary to ascertain whether an international conflict existed at the time of the alleged crimes in order to find that grave breaches of the Geneva Conventions had occurred, but it also had to be proven that the victims were 'protected persons'. By definition, "[p]ersons protected by the Conventions are those who...find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power *of which they are not nationals*."[20]

> In the context of the *Tadić* case, this requirement meant that the Prosecutor would have to demonstrate that the victims, who were nationals of Bosnia, were in the hands of Yugoslavia. The problem was that Yugoslavia had formally withdrawn its army (the JNA) from the territory of Bosnia [in May 1992] prior to the commission of the defendant's activities. From that time on, the fighting in Bosnia was carried on by the armed forces of the Bosnian Serbs who – although they claimed to be acting for the newly proclaimed state of *Republika Srpska* – were Bosnian nationals.[21]

The majority of judges in the Trial Chamber found that while, "the VRS [Bosnian Serb forces] was largely established, equipped, staffed and financed by the JNA,"[22] it was not under the 'effective control' of the government of the Federal Republic of Yugoslavia (FRY). On the basis of this seemingly semantic question, they concluded that the victims were not 'protected persons' because they were not in the hands of a power of which they are not nationals – the victims were Bosnians in the hands of Bosnians. Tadic was acquitted of all eleven counts of grave breaches to the Geneva Conventions.[23]

Many commentators have maintained that this was a misinterpretation of the meaning of 'protected persons'. As Theodor Meron argues in the *American Journal of International Law*,

> In many contemporary conflicts, the disintegration of states and the establishment of new ones make nationality too messy a concept on which to base the application of international humanitarian law...Indeed, the International Committee of the Red Cross's Commentary to Article 4 of the Fourth [Geneva] Convention states that the reason for excluding a country's own nationals from the definition of protected persons was to avoid interfering in a state's relations with its nationals, a concern obviously not relevant to the circumstances of the Tadic case, in which each ethnic group considered members of other ethnic groups as foreigners. In interpreting the law, our goal should be to avoid paralyzing the legal process as much as possible and, in the case of humanitarian conventions, to enable them to serve their protective goals.[24]

By adhering so closely to the letter of the law and requiring the stringent standard of 'effective control' (which even the presiding judge, in her dissenting opinion, argued was too strict a test and inapplicable to the case at hand),[25] the Trial Chamber majority ruling did little to make the Geneva Conventions more applicable to contemporary conflict. Instead, it made the prosecution of an entire category of crime – grave breaches – more difficult.

This is of concern for a number of reasons. First, despite the limitations imposed by the question of internationality and 'protected persons', grave breaches are more widely applicable than either genocide (which requires the intent to destroy a racial, ethnic, or religious group in whole or in part) or crimes against humanity (which requires widespread or systematic acts against a group). While violations of the laws or customs of war have no such stringent requirements, and are therefore the easiest of the ICTY's crimes to prove, grave breaches have a built-in enforcement mechanism and are widely accepted as a much more serious and well-recognized crime.[26] Finally, the inability to prosecute grave breaches could encourage the Tribunal to prosecute for crimes against humanity and genocide more often. "Not only does this handicap the Tribunal's ability to carry out its mandate, but some commentators also criticize the resort to such heavy artillery against evil, but relatively minor, actors."[27]

For all of these reasons, the decision posed problems, both for the advancement of justice in Bosnia and for the continued relevance of IHL. The Appeals Chamber realized this and, in 1999, reversed the Trial Chamber's decision, finding Tadic guilty of the seven grave breaches counts under appeal. They concluded that the armed forces of the Republic Srbska were under the 'overall

control' of FRY and that this was enough to classify the conflict as international, even after May 1992. Furthermore, the Appeals Chamber advanced a definition of 'protected persons'

> as those who do not have diplomatic protection and who are 'not subject to the allegiance and control' of the state in whose hands they may find themselves. Therefore it is the substance of the relations between the parties, not their legal characterization, which is controlling. The Appeals Chamber determined that the victims were 'protected persons' because they had no allegiance to the party in whose hands they were.[28]

This is clearly a much more progressive interpretation of both the question of internationality and of 'protected persons'. It markedly expands the scope of the Geneva Conventions by removing some of the stringent controls on who qualifies as protected and when a conflict may be termed international. In so doing, it expands the parameters of international humanitarian law, making it more applicable to future non-interstate conflicts.

Conclusion

By examining a number of the most contentious issues that the Tribunal has been forced to deal with, this paper has illustrated some of the challenges to making IHL relevant for contemporary armed conflict. The importance of such efforts is threefold: first, to deter future crimes by demonstrating the international community's willingness and ability to prosecute crimes committed in internal and international conflicts; second, to contribute to the maintenance and restoration of peace by assigning guilt "for war crimes to the individual perpetrators and the leaders responsible rather than allowing blame to fall on entire groups and nations,...thus defus [ing] ethnic tensions and assist[ing] in peacemaking;"[29] third, to do justice by removing any legal impediments to prosecution due to laws that are no longer consistent with the realities of contemporary conflict.

Notes

1. While 'Hague' law "is concerned with methods and means of warfare, including controls on weapons types and usage, and on tactics and the general conduct of hostilities," 'Geneva' law "is specifically concerned with the protection of the victims of armed conflict." Hilaire McCoubrey, *International Humanitarian Law*, 2nd edition (Aldershot, UK: Ashgate Publishing Ltd., 1998), 2.
2. The ICTR is also relevant, but is beyond the scope of this paper.
3. The ICTY has also been an important influence on negotiations for a permanent International Criminal Court (ICC), whose Statute was finally adopted in 1998. Once in operation, the ICC will without a doubt play a key role in the continued transformation of international humanitarian law.
4. Bartram Brown, "Nationality and Internationality in International Humanitarian Law," *Stanford Journal of International Law*, 34, no. 2 (summer 1998): 363.
5. Michael Scharf, "A Critique of the Yugoslavia War Crimes Tribunal," Denver Journal of International Law and Policy 25, no. 2 (winter 1997): 306.
6. William Shabas, "Sentencing by International Human Rights: A Human Rights Approach," *Duke Journal of Comparative and International Law* 7, no. 2 (spring 1997): 516.
7. *The Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, <www.un.org/icty/rapportan/first-94.htm>, 5.
8. For example, in 1995, the UN declared 'safe haven' of Srebrenica was overrun by Bosnian Serb forces, resulting in what is widely believed to have been the massacre of over 7,000 Bosniacs ('Bosnian Muslims'), mainly men and boys.
9. Walter Gary Sharp, Sr., "International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?" *Duke Journal of Comparative and International Law* 7, no. 2 (spring 1997): 450.
10. Ibid., 456
11. Interestingly, some commentators have argued that it is NATO's failure to arrest alleged war criminals that could prove to be the most destabilizing – only by bringing perpetrators to justice can collective guilt be transformed into individual guilt. Ibid., 454.
12. Charles Trueheart, "A New Kind of Justice," *Atlantic Monthly* 285, no. 4 (April 2000): 84.
13. *Statute of the International Tribunal*, adopted 25 May 1993, Article 1.
14. Ibid., Article 2. Emphasis added.
15. Rochus Pronk and Brian Tittemore, "ICTY Issues Final Judgement Against Dusan Tadic in First International War Crimes Trial Since World War II," *Human Rights Brief* 4, no. 3 (spring 97).
16. *Decision on the Defence Motion on the Jurisdiction of the Tribunal*, 10 August 1995, cited in John R.W.D. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Irvington-on-Hudson, NY: Transnational Publishers, Inc., 1998), 13.
17. *Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, cited in Ibid., 14.
18. Ibid., 36.
19. Including Judge Li, one of the Appeals Chamber judges who offered a separate dissenting opinion. See Ibid., 39.
20. *1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Article 4 (emphasis added).
21. Faiza Patel King and Anne-Marie La Rosa, "International Criminal Tribunal for the Former Yugoslavia," *European Journal of International Law* 9, no. 4 (1998): 757-760
22. Jones, "Practice of the International Criminal Tribunals," 23.
23. Tadic was, however, found guilty on 11 other counts – 5 counts of violations of the laws or customs of war (including violations of Common Article 3) and 6 counts of crimes against humanity.
24. Theodor Meron, "Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout," *American Journal of International Law* 92, no. 2 (April 1998): 236-41.
25. Jones, "Practice of the International Criminal Tribunals," 26.
26. Brown, *Nationality and Internationality*, 391.
27. Meron, "Classification of Armed Conflict."
28. Kelly Askin, "News from the International Criminal Tribunals," *Human Rights Brief* 7, no. 1 (fall 1999).
29. Theodor Meron, "Answering for War Crimes, *Foreign Affairs* 76, no. 1 (January/February 1997): 2-3.

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